SOON KOK LEONG v. MINISTER OF INTERIOR, MALAYSIA

[O.C.J. (Ismail Khan J.) July 10, 1968]
[Seremban — Originating Motion No. 54 of 1966]

Practice and Procedure — Application by way of motion to set aside expulsion order and order of deprivation of citizenship — Whether in proper form — s. 2 of Pt. III of Second Schedule of Malaysian Constitution.

Administrative Law — Expulsion order and order of deprivation of citizenship — Power of court to review such orders — S. 2 of Pt. III of Second Schedule of Malaysian Constitution.

This was an application by way of motion for an order to set aside (i) an expulsion order and (ii) an order of deprivation of citizenship served on the applicant. The respondent submitted that by reason of section 2 of part III of the Second Schedule of the Constitution of Malaysia, a decision of the Federal government under part III of the Constitution should not be subject to appeal or review is any court.

Held, dismissing the application: the application was not in proper form. The application should have been for an order of *certiorari* to quash the two orders made by the government.

Cases referred to:—

(1) *Lim Lian Geok* v. *The Minister of Interior, Federation of Malaya* [1964] M.L.J. 158.

(2) *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at pp. 204, 205.

(3) *Re Gilmore's Application* [1957] 1 All E.R. 796 at p. 801.

ORIGINATING MOTION.

Atma Singh Gill for applicant.

Abdul Razak bin Dato' Abu Samah for respondent.

Cur. Adv. Vult.

Ismail Khan J.: In this application made by way of motion, the applicant seeks an order setting aside (1) an expulsion order made against him, No. 47 of 1966 dated 25th October, 1966, and served on him on 14th November, 1966; and (2) an order of deprivation of citizenship dated 5th July, 1966, (hereinafter called "the deprivation order").

The grounds set out in the application for setting aside the deprivation order are that:—

"(1) it was *ultra-vires;* or

(2) alternatively bad in law; or

(3) in the further alternative the grounds embodied in in the said order were unfounded and cannot be sustained".

No grounds are disclosed for setting aside the expulsion order, but counsel for the applicant says that if he is successful in his application in respect of the deprivation order he could then deal with the application as to the expulsion order.

In his affidavit in support of the application, the applicant stated that he was born in Seremban on 24th April, 1936. His mother was running and is still running a paper business in Murray Street, Seremban. He was educated in various schools in Seremban until he was 20 years old. He became a Federal Citizen by operation of law by virtue of registration under clause 125 of the Federation of Malaya Agreement, 1948. On 12th March, 1957, due to the illness of his aged grandmother he left for China. After her death he returned to Malaya on 1st October, 1961. Later, he was employed as assistant manager at a hotel and restaurant in Bentong, Pahang.

On 17th May, 1966, at Bentong. he received a notice from the Registrar-General of Citizens, Malaysia, that the respondent intended to make an order under article 24(2) of the Constitution of Malaysia depriving him of his citizenship of Malaysia on the ground that he had voluntarily claimed and exercised in a foreign country, namely, Communist China, rights accorded exclusively to its citizens. At the time he received the notice, the person who translated it to him merely said that it was a notice depriving him of his citizenship. He was not told that the notice also said that unless he asked for a reference of his case to a committee of inquiry within one month, there would be an order depriving him of his citizenship. He then received the deprivation order. On 14th November, 1966 he received the expulsion order dated 25th October, 1966.

It is agreed that until the day he was deprived of his citizenship the applicant was a federal citizen by operation of law. Mr. Atma Singh, his counsel, pointed out as such a citizen he could not be deprived of his citizenship for anything done before Merdeka Day — see article 28(3) (added by the Malaysia Act No. 26 of 1963) which reads:—

"A person who on Merdeka Day became a citizen by operation of law as having beeen a citizen of the Federation immediately before that day shall not be deprived of citizenship under clause (1) or (2) of article 24 by reason of anything done on or before that day; but in the case of any such person clause (2) of article 25 shall apply equally in relation to a period of residence in foreign countries beginning before Merdeka Day and in relation to such a period beginning on or after that day."

The notice intimating that he would be deprived of his citizenship was dated 14th May, 1966, and the order made on 5th July, 1966. It was contended that as he had returned to Malaya from China in 1961, proceedings to deprive him of his citizenship should have been instituted before September, 1963. The deprivation order was made without jurisdiction.

Enche Abdul Razak for the respondent referred to section 2 of the Second Schedule in respect of part III of the Constitution which provides that a decision of the Federal Government under part III of the Constitution shall not be subject to appeal or review in any court. This, I feel, should have been brought up as a prelimi-

nary point. Mr. Atma Singh submitted that despite this provision the court is not precluded from reviewing the decision of the minister. He referred to the following passage in *Groves* on the Constitution of Malaysia at page 159:—

"Section 2 of part III of the Second Schedule states that a decision of the Federal Government in connection with citizenship shall not be subject to appeal or review in any court. Since such a pronouncement has limited meaning in connection with deprivation of citizenship and could also not apply to those whose claim of citizenship is by operation of law, for an executive determination cannot be conclusive of a vested right, the provision must be directed towards the decisions of government on applications for citizenship, the relevant articles themselves placing discretion in government or empowering government to make a substantial number of subjective conclusions, such as those determining 'good character'."

He also cited the case of *Lim Lian Geok* v. *The Minister of Interior, Federation of Malaya.*[1] In that case the Minister had not yet made any order. On receipt of the notice under article 27, the applicant obtained an order *nisi* prohibiting the Minister from holding the inquiry. The order was later discharged.

In the present case, notice was given to the applicant informing him of the ground on which the order was proposed to be made and of his right to have his case referred to a committee of inquiry. He failed to ask for such a reference and in the result the Minister made the order. On the failure of the applicant to ask for an inquiry the Minister could, but was not obliged, to hold an inquiry.

The order is now challenged in this application. It is said that this order cannot now be questioned in any court. The court has, however, by means of orders of *mandamus*, prohibition and *certiorari* jurisdiction to control inferior courts and other persons and bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially — see *R.* v. *Electricity Commissioners,*[2] pages 204, 205. And where no right of appeal to the courts exists, the order of *certiorari* forms the principal means by which the determination of these tribunals and other persons and bodies can be brought before the court — see *Halsbury*, 3rd Ed., vol. 11, page 53.

The words in section 2 of the said Schedule "The decision . . . . shall not be subject to appeal or review" would appear to mean that it is final.

In *Re Gilmore* [3] at page 801, Denning L.J. said:—

"The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to *certiorari*'. It makes the decision final on the facts, but not final on the law . . . . *Certiorari* can still issue for excess of jurisdiction or for error of law on the face of the record."

It would therefore appear that as a means of questioning the action of the respondent, the applicant should have applied for an order of *certiorari*. There is no provision relating to the procedure of *certiorari* in our Rules of the Supreme Court or in any written law, so recourse must be had to Order 72 rule 2 of the rules which reads:—

"Where no other provision is made by any written law or these rules, the present procedure and practice in England or in Malaya remain in force".

The relief sought in this application is two-fold:—

(1) An order setting aside the said expulsion order;

(2) An order setting aside the deprivation order.

Under section 10 of the Banishment Ordinance, 1959, the person against whom a banishment order is made could apply to the High Court to have it set aside and proceed by way of a miscellaneous criminal application. But there could be no application for an order of *certiorari* without leave of the court. (See English Order 59 rule 3). In this case no such leave was obtained.

The application as it stands is therefore not in proper form and is dismissed with costs, but without prejudice to a fresh application.

Application dismissed.

Solicitors: *Atma Singh Gill / Co.*

MAJID v. MUTHUSWAMY

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Winslow J.) August 13, 1968]

[Singapore — Federal Court Civil Appeal No. Y 44 of 1967]

Advocate and Solicitor — Negligence — Professional negligence — Liability for.

In Singapore an advocate and solicitor can be sued for professional negligence where the act complained of is an act done in his capacity of a solicitor but will not be liable for negligence if the act complained of is done in his capacity as an advocate.

[Editorial Note: We would draw the attention of our readers to the article by Mr. G. Starforth Hill on "The Liability of an Advocate and Solicitor for Negligence in the Course of his Professional Duties" appearing at p. xvi *ante*.]

Case referred to:—

(1) *Rondel* v. *Worsley* [1967] 3 All E.R. 993, H.L.

FEDERAL COURT.

N. N. Leicester for the appellant.

L. A. J. Smith for the respondent.

G. Starforth Hill as *amicus curiae.*

Wee Chong Jin C.J. (delivering oral judgment of the court): The claim is for damages for negligence on the part of a deceased solicitor by a client in relation to three court proceedings but in respect of two of the three court proceedings, it is clear they disclose no cause of action because the statement of claim not only